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No. 85-2136

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY CAB COMPANY OF ORLANDO, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the six-months statute of limitations in Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), precludes the Board from proceeding against post-settlement unfair labor practices which occurred more than six months prior to the filing of an unfair labor practice charge where the settlement was properly set aside for non-fulfillment of its purposes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. 19a-50a) is reported at 273 N.L.R.B. 1344.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1986. The petition for a writ of certiorari was filed on June 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, the National Labor Relations Board (the Board) certified Yellow, City, Dixie Independent Cab Drivers Association (the Union) as the representative of

petitioners' drivers. The parties entered into an interim collective bargaining agreement in March 1978. Pet. App. 23a. In November 1978, after the District of Columbia Circuit ruled that taxicab drivers in Chicago were independent contractors excluded from the coverage of the Act,[1] petitioners withdrew their recognition of the Union (*ibid.*). Thereafter, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union respecting the Orlando drivers. 242 N.L.R.B. 94 (1979). Petitioners filed a petition for review of the Board's decision in the United States Court of Appeals for the District of Columbia Circuit.

On July 3, 1979, two months after the Board's refusal-to-bargain decision and while the petition for review was pending, the Union filed a charge alleging that petitioners had made unlawful unilateral changes in the drivers' wages and working conditions by increasing petitioners' charges to the drivers for leasing cabs and making certain other changes in bidding procedures. Pet. App. 24a (Board Case No. 12-CA-8705). On July 25, 1979, the Regional Director issued a complaint alleging that petitioners had violated their bargaining obligation under the Act by making unilateral changes in conditions of employment. In August 1979, the parties entered into a written agreement settling the unfair labor practice complaint with the approval of the Board's Regional Director. In the settlement agreement, petitioners agreed not to make unilateral changes in employment, to bargain with the Union upon request, and to "make whole" any employees who incurred monetary losses due to petitioners' unilateral changes. Pet. App. 24a-25a; GCX 3(a) and (b).[2] The settlement agreement contained a stipulation

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[1] *Local 777, Democratic Union Organizing Comm.* v. *NLRB*, 603 F.2d 862 (D.C. Cir. 1978).

[2] "GCX" references are to the General Counsel's exhibits at the unfair labor practice hearing.

recognizing that the issue of whether the drivers were employees or independent contractors was pending in the District of Columbia Circuit. It provided that the settlement would be null and void if the Board's position on this issue were rejected by the District of Columbia Circuit, but that if the Board's position were ultimately upheld by the federal courts, petitioners would thereupon immediately abide by and give effect to the settlement agreement (Pet. App. 25a; GCX 3(e)).

On July 30, 1980, the District of Columbia Circuit upheld the Board's assertion of jurisdiction over petitioners' drivers and enforced the Board's bargaining order against petitioners. 628 F.2d 261. After petitioners' petition for rehearing was denied in September, petitioners, without notifying the Union, made changes in the daily rental rate and mileage surcharge in October and December 1980, and in January 1981 (Pet. App. 31a-32a).

The parties resumed bargaining in January 1981 (Pet. App. 26a). In July, while negotiations continued, petitioners unilaterally reinstituted a daily mileage surcharge of 20 cents per mile over 170 miles. The Union then filed a charge in Board Case No. 12-CA-9788 alleging that petitioners had violated their duty to bargain by making this unilateral change. Pet. App. 31a.

Meanwhile, after the District of Columbia Circuit's decision in July 1980, the Board's regional office attempted to get petitioners to comply with the "make whole" provision of the settlement agreement (Pet. App. 27a-29a). These efforts were unsuccessful. Accordingly, by letter dated August 26, 1982, the Regional Director set aside the settlement agreement because it had "failed in its purpose and because of allegations of post-settlement violations of the Act" (Pet. App. 32a). Thereafter, in September 1982, the

Director consolidated Board Cases Nos. 12-CA-8705 and 12-CA-9788, and issued a complaint alleging that petitioners had violated the Act by their unilateral changes in wages and working conditions before as well as after the settlement agreement.

2. Agreeing with the administrative law judge, the Board found that the Regional Director had properly set aside the settlement agreement. Again in agreement with the administrative law judge, the Board found that petitioners violated Section 8(a)(5) and (1) of the Act, by unilaterally changing the terms and conditions of their employees' employment on various occasions from 1979 through 1981, without notice to the Union or an opportunity for the Union to bargain concerning those changes. Pet. App. 20a, 33a, 35a, 40a. In finding that the settlement agreement had been properly set aside, the Board found the petitioners' post-settlement unilateral actions violated the promises of its settlement agreement, and, given the parties' inability to agree on the amount of the petitioners' liability for back pay, the settlement had failed in its purpose to compensate the drivers for lost income (*id.* at 33a, 40a). The Board also rejected petitioners' contention that Section 10(b) of the Act, 29 U.S.C. 160(b), precluded the Board from processing the unfair labor practice charges involving the unilateral changes in late 1979 and 1980 because the Union did not file a new charge until July 1981, more than 6 months after the conduct occurred. The administrative law judge and the Board found that proceeding on both of the Union's charges was proper because the settlement had been properly set aside (Pet. App. 20a n.3, 40a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 18a). The court found that petitioners' unilateral changes in rental rates and other terms of employment constituted unlawful conduct within

the meaning of Section 8(a)(5) of the Act, and the court rejected petitioners' contention that they were not required to bargain about those changes because they were a continuation of established past practice (Pet. App. 6a-9a).

The court also rejected petitioners' assertion that the settlement agreement was not properly set aside. The court noted that the Board had relied upon two independent grounds in setting aside the agreement: that the agreement had failed to achieve its purpose, and that petitioners had committed post-settlement violations of the Act. Pet. App. 10a. Finding the former ground sufficient to justify setting aside the settlement agreement, the court found it unnecessary to consider whether the settlement agreement was properly set aside based on the latter ground as well (*id.* at 13a).[3]

Finally, the court rejected petitioners' argument that, even assuming the settlement agreement had been properly set aside, most of the post-settlement violations in the consolidated complaint were time-barred by Section 10(b) of the Act (Pet. App. 13a). Citing *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 309 (1959), the court explained that Section 10(b) does not preclude the Board from "deal[ing] with subsequent conduct under a previous charge if the conduct is 'related to' the unfair labor practices alleged in the charge and 'grow[s] out of' them while the proceeding is pending before the Board" (Pet. App. 15a-16a). The court pointed out that here "the Union filed a timely charge as to the initial round of unilateral changes. The charges were of precisely the same class of violations as was prescribed in the original complaint. Accordingly, had the settlement not intervened,

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[3]Thus, the court noted, but did not reach, petitioners' argument that settlements may not be set aside based on "post-settlement violations which are not the subject of charges filed within six months of the violations" (Pet. App. 13a).

and if the Regional Director's investigation had brought to light the 1980 and 1981 violations, *Fant Milling* authorized the Board to issue a complaint consolidating the entire series of unfair labor practices without the necessity of another charge and without regard to the interval between the issuance of the complaint and the violation dates" (Pet. App. 16a-17a). Once the settlement agreement was set aside, the case was in exactly that posture[4] (*id.* at 17a-18a).

ARGUMENT

Petitioners do not challenge the Board's findings, upheld by the court of appeals, that (1) petitioners unlawfully unilaterally changed the terms and conditions of employment of their drivers both before and after the settlement agreement, and (2) the settlement agreement was properly set aside because it had failed in its purpose to compensate the drivers for petitioners' pre-settlement unlawful conduct. Petitioners contend only that most of the findings of unlawful post-settlement conduct were time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b). There is no merit to that contention, and it does not warrant review by this Court.

Section 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." Here, the Union's charge in Board Case No. 12-CA-8705 was filed on July 3, 1979, two months after petitioners' initial round of unilateral changes in May 1979. The Union's next charge, in Board Case No. 12-CA-9788, was filed on July 20, 1981, one week after petitioners reinstated an excess mileage surcharge on July 13. Since this

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[4]The court rejected, as unsupported by the facts, petitioners' assertion that the Board's " 'post-hoc reliance' " on *Fant Milling* was impermissible. The court found that the Board's rejection of petitioners' Section 10(b) argument accurately stated the law as enunciated by *Fant Milling* (Pet. App. 17a n.8).

charge was filed almost two years after the unilateral changes in late 1979, and almost a year after the unilateral changes in late 1980, petitioners contend that Section 10(b) precludes the Board from alleging or finding that the 1979 and 1980 conduct was in violation of the Act.

However, the "limitation [in Section 10(b)] extinguishes liability for unfair labor practices committed more than six months prior to the filing of a charge. It does not relate to conduct subsequent to the filing of the charge." *NLRB* v. *Fant Milling Co.*, 360 U.S. at 309 n.9. Once a timely unfair labor practice charge has been filed, the Board "is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' " *Id.* at 309 (quoting *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 359 (1940)). Accordingly, the courts of appeals have uniformly held that where a timely charge has been filed concerning alleged unlawful conduct and the Regional Director's investigation has brought to light other similar alleged violations, the Director is authorized to issue a complaint consolidating the entire series of unfair labor practices without the necessity of another charge and without regard to the interval between the issuance of the complaint and the violation dates. *NLRB* v. *Complas Industries, Inc.*, 714 F.2d 729, 732-733 (7th Cir. 1983); *Eastern Maine Medical Center* v. *NLRB*, 658 F.2d 1, 6-7 (1st Cir. 1981); *NLRB* v. *Jack La Lanne Management Corp.*, 539 F.2d 292, 295 & n.1 (2d Cir. 1976); *NLRB* v. *Rex Disposables*, 494 F.2d 588, 590 (5th Cir. 1974); *NLRB* v. *International Union of Operating Engineers*, 460 F.2d 589, 600-601 (5th Cir. 1972). Here, the Union filed a timely charge as to petitioners' initial unilateral changes, and petitioners do not dispute that the subsequent unilateral changes were "related to those alleged in the [initial]

charge."[5] Thus, had the settlement not intervened, the Regional Director could have amended the initial complaint to allege the entire series of unfair labor practices without the necessity of filing another charge, and subsequent charges could have been consolidated with those in the initial complaint irrespective of the violation dates.

Petitioners assert (Pet. 13) that *Fant Milling* is inapplicable in "settlement cases" because "[c]harges resolved by settlement agreement are no longer 'pending before the Board.' Settlement agreements create the expectation that all outstanding disputes have been resolved." The principles enunciated in *Fant Milling*, however, fit comfortably in the settlement context.

After a timely charge results in the issuance of a complaint, the settlement agreement brings to a halt for a time the Board's investigatory process. Once the settlement is properly set aside, however, the Regional Director recovers his full prosecutorial authority to prosecute both pre-settlement and post-settlement violations. See *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944); cf. *Fant Milling*, 360 U.S. at 302-303 (dismissal of charge withdrawn after subsequent unfair labor practices brought to Regional Director's attention). Therefore, the Regional Director properly consolidated within the amended complaint all the post-settlement violations. See *Globe Gear Co.*, 189 N.L.R.B. 422 (1971), enforced, 451 F.2d 1348 (6th Cir. 1971) (Regional Director properly set aside settlement agreement upon

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[5]Petitioners erroneously assert (Pet. 11-12) that the Court's admonition in *Fant Milling* (360 U.S. at 309) that the Board does not have "carte blanche" authority to expand a charge supports their position. The Court's admonition warned against reaching conduct that is not "related to" and does not "grow out of" the prior conduct; that is not an issue in this case.

information that employer had breached its promise to supply economic data to the union, even though the union had not filed a new unfair labor practice charge).

This result does not contravene the policy of Section 10(b) of the Act, which is to give respondents prompt notice of possible liability so that they may prepare their defense before " 'records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' " *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411, 419 (1960) (citation omitted). The Union's initial July 3, 1979, charge gave petitioners timely notice that the Union was challenging their unilateral changes. Although the resulting complaint proceeding was "continued without date" by virtue of the settlement agreement (GCX 3(e)), petitioners were on notice that the Regional Director would treat any repetition of their unilateral conduct as an additional violation of the Act. There was no need for the Union to file charges every six months in order to apprise petitioners that they might be called to account for their new unfair labor practices.

Inyo Lumber Co., 98 N.L.R.B. 984, 986 (1952), on which petitioners rely (Pet. 14-15), does not dictate a contrary result. The settlement agreement there was set aside because of the employer's post-settlement unfair labor practices. The Board dismissed the complaint because the union filed its post-settlement charge more than nine months after commission of the unlawful conduct. The Board explained that while Section 10(b) would not preclude it from proceeding in those circumstances, a policy prohibiting a charging party from overturning a settlement on the basis of unjustifiably delayed charges about post-settlement unfair labor practices may serve to reassure charged parties that they may engage in settlements without the risk of having them overturned on the basis of stale claims. *Inyo*, 98 N.L.R.B. at 985-986 & n.3. This is not a case where the

wrongdoer has fully performed its promises to cease and desist from—and to make amends for—its original misconduct. Rather, apart from any further charges by the Union, the Regional Director was entitled to set aside the settlement because, due to the company's failure to compensate the drivers for its pre-settlement unlawful conduct, the settlement failed to accomplish its purpose and to effectuate the policies of the Act.[6] Accordingly, here there was no issue of the settlement having been set aside because of stale claims.[7]

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[6]As noted above (page 5 note 3), the court of appeals found that the settlement was properly set aside because its purposes were not effectuated, and did not decide whether the settlement could have been set aside simply because of the subsequent unfair labor practices.

[7]There is no merit to petitioners' additional assertion (Pet. 9-11) that the court of appeals improperly ruled on the Section 10(b) issue here in the absence of a Board determination thereon. The Board rejected petitioners' Section 10(b) argument because it found that the settlement was properly set aside. The court of appeals agreed, relying on *Fant Milling* as authority. The fact that the Board did not cite *Fant Milling* is immaterial; the Board's decision properly applied the principles enunciated therein. See *Borek Motor Sales, Inc.* v. *NLRB*, 425 F.2d 677, 681 (7th Cir.), cert. denied, 400 U.S. 823 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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